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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937
No. 38

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Petitioner,

vs.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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IN THE

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FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Petitioner,* *vs.* LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York, *Respondent.*	No. 38

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

This case is here on writ of certiorari granted June 1, 1937 to review a decision of the United States Circuit Court of Appeals for the Second Circuit affirming a final judgment of the United States District Court for the Southern District of New York in favor of respondent in an action brought by respondent against petitioner upon a written agreement.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 78) is reported in 88 F. (2d) 630 and the opinion of the District Court for the Southern District of New York (R. 54) is reported in 15 F. Supp. 715.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 15, 1937 (R. 82). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT

This is a test case the sole issue in which is the correct construction of a standard form of reinsurance agreement.

The agreement sued upon was made by Southern Surety Company of New York, hereinafter called "Southern", and petitioner. Southern having issued a fidelity bond, Southern and petitioner executed a memorandum by which petitioner reinsured Southern (R. 19-20, 33, 21, 48). This memorandum made the reinsurance subject to a general reinsurance agreement in force between the parties (R. 48, 41). The general reinsurance agreement made all reinsurance between the parties subject to the standard form of reinsurance agreement adopted by the Surety Association of America on January 15, 1930, a copy of which was attached to the agreement (R. 41-42, 47).

By provisions of this standard form, which are hereinafter set forth (*infra*, p. 4), petitioner reinsured Southern "against loss" under the bond, and agreed to pay reinsurance "upon proof of the payment" by Southern of

the loss under the bond. Petitioner contends that by reason of these provisions payment by Southern of the loss under the bond is a condition precedent to recovery of reinsurance.

Southern, the reinsured, became liable on the bond in the amount of $7,045.41 (R. 20-21). This liability has not been paid and never will be paid in full because Southern is insolvent and even if recovery is allowed in this case Southern will pay on account of the loss under the bond only a dividend in the same proportion as it pays on other general claims (R. 22-23).

Respondent, as liquidator of Southern, sued for reinsurance in the amount of one-half of Southern's liability, one-half being the proportion in which reinsurance was effected (R. 8-10, 48).

A jury was waived and the action was tried upon an agreed statement of facts which was adopted by the District Court as its special findings of fact (R. 15-50).

The District Court gave judgment for respondent and the judgment was affirmed by the Circuit Court of Appeals (R. 59, 82).

The case does not involve any special right of the obligee to which Southern is liable under the bond because that obligee is merely a general creditor of Southern and would have no lien upon or preferred claim to any reinsurance recovered.[1] The controversy merely concerns the right of respondent, as liquidator of Southern, to recover reinsur-

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[1]This is conceded (R. 23), and is well settled. See *Morrow* v. *Burlington Basket Co.*, 66 S. W. (2d) 746, 749 (Tex. Civ. App.); *United States* v. *Federal Surety Co.*, 72 F. (2d) 964, 967 (C. C. A. 4th), certiorari denied 294 U. S. 711; *Insurance Co. of Penn.* v. *Park & Pollard Co.*, 190 App. Div. 388, 393 (1st Dept.), aff'd 229 N. Y. 631; *Glen* v. *Hope Mutual Life Ins. Co. of N. Y.*, 56 N. Y. 379, 382.

ance under the standard form of reinsurance agreement for the benefit of general creditors without paying the loss under the bond.

The standard form of reinsurance agreement reinsures the reinsured "against loss" as follows:

> "IN CONSIDERATION of the premium payable under section 1 hereof hereinafter called the REINSURER, does hereby reinsure hereinafter called the REINSURED, under bond numbered , together with all riders attached thereto, hereinafter called the BOND, issued by the Reinsured in the penalty of Dollars, in favor of (obligee), and in behalf of hereinafter called the Principal, *against loss* thereunder and against costs and expenses, as hereinafter defined, and interest." (R. 47, lines 1-9.) (Italics ours.)

Then follow fifteen sections setting forth the conditions of the agreement (R. 47, lines 11-192). Section 4 requires payment of the reinsurance "upon proof of the payment" by the reinsured of the loss under the bond as follows:

> "The Reinsurer's proportionate share of a loss under the bond, of costs and expenses as hereinafter defined, and of interest, shall be paid to the Reinsured *upon proof of the payment* of such items *by the Reinsured,* and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs *and the payment thereof.*" (R. 47, lines 72-77.) (Italics ours.)

The Circuit Court of Appeals sustained a claim for reinsurance in this case under the standard form of reinsur-

ance agreement although the loss under the bond had not been paid, because the court believed that such a decision was required by *Allemannia Ins. Co.* v. *Firemen's Ins. Co.*, 209 U. S. 326 (R. 79).

The Circuit Court of Appeals indicated in its opinion that it would have held that payment by the reinsured of the loss under the bond is a condition precedent to recovery of reinsurance but for the decision in the *Allemannia* case. It refers in its opinion to the provision in Section 4 of the standard form which requires payment of the reinsurance "upon proof of the payment" by the reinsured as the "critical words" and says:

> "* * * There are other provisions, as for example those relating to the apportionment of any collateral, which go to confirm the conclusion that the agreement did not subject the reinsurer to any liability except for a loss actually paid by the reinsured; but we need not consider them because we shall take it arguendo—and indeed we cannot see how it could be taken otherwise—that, as a new question, payment of the loss was a condition upon the reinsurer's obligation. Were it not for circumstances which seem to us conclusive, we should have felt ourselves obliged to read the promise in the defendant's sense.
>
> The controlling fact is the decision of the Supreme Court in *Allemannia Ins. Co.* v. *Firemen's Insurance Co.*, 209 U. S. 326, 28 S. Ct. 544, 545, 52 L. Ed. 815, 14 Ann. Cas. 948, in which there was a clause on whose similarity to, and difference from, the fourth article of the agreement in suit the result at bar must turn." (R. 79.)

A copy of the agreement construed by this Court in the *Allemannia* case is set forth in the Appendix to this brief.

The *Allemannia* agreement reinsures the reinsured "under its policies" as follows:

> "By this compact of reinsurance The Allemannia Fire Insurance Company of Pittsburg, Pa., under the terms, conditions and stipulations hereinafter mentioned, *hereby agrees to reinsure* the Firemen's Insurance Company of Baltimore, Maryland, *under its policies,* renewals, entries, or certificates (herein termed contracts) in such amounts, for such periods of time, and at such rates of premium, as shall be entered in the book hereto attached, and duly reported, as hereinafter provided * * *." (Appendix, p. 21, *infra.*) (Italics ours.)

The provisions of the *Allemannia* agreement which are deemed by the Circuit Court of Appeals in its opinion in this case to make the *Allemannia* case controlling are as follows:

> "10. Upon receiving notice of any loss or claim under any contract hereunder reinsured the said reinsured Company shall promptly advise the said Allemannia Fire Insurance Company, at Pittsburg, Pa. of the same, and of the date and probable amount of loss or damage, and after said reinsured Company shall have adjusted, accepted proofs of, *or* paid such loss or damage, it shall forward to the said Allemannia Fire Insurance Company, at Pittsburg, Pa., a proof of its loss and claim against this Company, upon blanks furnished for that purpose, by said Firemen's Insurance Company, together with a copy of the original proofs and claim under its contract reinsured, *and a copy of the original receipt taken upon the payment of such loss;* and upon request, shall exhibit and permit copies to be made

of all other papers connected therewith, which may be in its possession.

11. Each entry under this Compact, unless otherwise provided in this Compact, shall be subject to the same conditions, stipulations, risks, and valuation as may be assumed by the said reinsured Company under its original contracts hereunder reinsured, and losses, if any, shall be payable prorata with, in the same manner, and upon the same terms and conditions as paid by the said reinsured Company under its contracts hereunder reinsured, *and in no event shall this Company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured Company* under its original contracts hereunder reinsured, after deducting therefrom any and all liability of other reinsurers of said contracts or any part thereof." (Appendix, pp. 24-25, *infra.*) (Italics ours.)

The opinion of the Circuit Court of Appeals in the present case indicates that its conclusion that the case is governed by the *Allemannia* case rests upon two alternative lines of reasoning, the first of which treats the *Allemannia* case as a controlling precedent and the second of which treats that case as a controlling fact bearing upon the intention of the parties.

In its first line of reasoning the Circuit Court of Appeals refers to the provision in Section 10 of the *Allemannia* agreement to the effect that after the reinsured shall have "adjusted, accepted proofs of, *or* paid" the loss it shall forward to the reinsured a proof of its loss and claim, together with a copy of the original proofs and claim "and a copy of the original receipt taken upon the payment of such loss",

and to the provision in Section 11 to the effect that "in no event shall this Company [the reinsurer] be liable for an amount in excess of a ratable proportion of the sum *actually paid* * * * by the said reinsured company * * *" (R. 79-80). The Circuit Court of Appeals observes that the use of the particle, "or", in Section 10 "seemed indeed to say that the reinsured might recover without paying the claim—that is, by only adjusting the loss or accepting proofs of it * * *", but says that the language of Section 11 to the effect that in no event should the reinsurer be liable for an amount in excess of a ratable proportion of the sum "actually paid" by the reinsured "certainly precluded taking the disjunctive as giving the reinsured any option", and points out that the general reasoning of the opinion in the *Allemannia* case concerned the nature, incidents and meaning of reinsurance in general and that that opinion "somewhat strangely, ignored" and "apparently did not consider" the language of Section 11 (R. 80). This apparently implies that because words in the *Allemannia* agreement which confined the liability of the reinsurer to a proportion of the sum "actually paid" by the reinsured were disregarded in reaching the decision in the *Allemannia* case, the words in the standard form involved here which condition the reinsurer's liability upon proof of payment by the reinsured should likewise be disregarded.

With respect to this line of reasoning of the Circuit Court of Appeals petitioner contends (1) that proof of payment by the reinsured is made a condition precedent by the plain meaning of the language of the standard form (*infra*, pp. 11-14), (2) that nothing in the *Allemannia* case requires that this plain meaning be disregarded

(*infra*, pp. 15-17) and (3) that no rule of law requires that this plain meaning be disregarded (*infra*, pp. 17-18).

The second line of reasoning of the Circuit Court of Appeals is based upon a chain of assumptions, partly expressed and partly implied, as follows: (1) That the draughtsmen of the standard form involved here, which was adopted by the Surety Association of America in 1930, and of an antecedent form adopted by the same association in 1915, had knowledge of the *Allemannia* case, (2) that draughtsmen with such knowledge would have used different language if they had intended the standard form to make proof of payment by the reinsured a condition precedent, (3) that when Southern and petitioner incorporated the standard form into the agreement sued upon the intention of the draughtsmen of the standard form was imputable to them, and, therefore, (4) that Southern and petitioner did not intend to make proof of payment by the reinsured a condition precedent (R. 81). No evidence of intention was introduced or offered (R. 16-24). The record does not contain any evidence or finding that the draughtsmen, who are not even identified, had knowledge of the *Allemannia* case or had any relation to Southern or petitioner (R. 18-24).

With respect to this line of reasoning of the Circuit Court of Appeals petitioner contends that the Court's conclusion as to the intention of the parties is erroneous because it is inconsistent with the plain meaning of the language used and the assumptions upon which it is based are not supported by any evidence (*infra*, pp. 19-20).

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred

1. In holding that respondent can recover reinsurance under the agreement sued upon without paying the loss under the bond with respect to which the reinsurance was effected;

2. In holding that payment by the reinsured of the loss under the bond is not a condition precedent to respondent's right to recover reinsurance under the agreement sued upon;

3. In holding that the agreement sued upon is an agreement of indemnity against liability;

4. In applying the decision in *Allemannia Ins. Co.* v. *Firemen's Ins. Co.*, 209 U. S. 326, case as a controlling precedent;

5. In giving to the agreement sued upon a construction based upon certain assumptions of fact which are inconsistent with the plain meaning of the language of the agreement and are unsupported by any evidence.

ARGUMENT

I.

PROOF OF PAYMENT BY THE REINSURED OF THE LOSS UNDER THE BOND IS MADE A CONDITION PRECEDENT BY THE PLAIN MEANING OF THE LANGUAGE OF THE STANDARD FORM.

The provision of the standard form of reinsurance agreement involved in this case which requires payment of the reinsurer's share of the loss under the bond and of costs, expenses and interest "upon proof of the payment of such items by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof" (R. 47, lines 72-74; quoted in full *supra,* p. 4) literally makes proof of payment by the reinsured a condition precedent. The word "upon" is commonly used to express the dependence of an obligation upon a condition. *Leeper Bros. Lumber Co.* v. *Gunter,* 61 Okla. 122; *Welch* v. *Matthews,* 98 Mass. 131; *Courtright* v. *Deeds,* 37 Iowa 503; *Casey* v. *Metropolitan Life Insurance Co.,* 123 Misc. 224; *Mascioni* v. *Miller, Inc.,* 261 N. Y. 1, 4; *Amies* v. *Wesnofske,* 255 N. Y. 156, 161, 162. The words "upon proof of the payment" etc. correspond with the common "proof of loss" clause, the effect of which is to make the proof of loss a condition precedent to the obligation to pay insurance. *Bergholm* v. *Peoria Life Ins. Co.,* 284 U. S. 489; *Strang* v. *Prudential Ins. Co.,* 263 N. Y. 71; *Fink* v. *Catholic Order of Foresters,* 161 Minn. 70; *Connecticut General Life Ins. Co.* v. *Williams,* 87 S. W. (2d) 807 (Tex. Civ. App.); *Vecchio* v.

Metropolitan Life Ins. Co., 224 App. Div. 301; *Moriarty* v. *Tomlinson*, 58 S. D. 431. See 33 C. J. 7-8, 74-75.

The sentence immediately following the words "upon proof of the payment" etc. makes an exception, giving the reinsured the right to give the reinsurer written notice of its intention to pay the loss on a certain date and require payment of the reinsurance by such date (R. 47, lines 74-79).[1] The very existence of this exception, which is not applicable here because no such notice has been given, shows that the words "upon proof of the payment" express a condition precedent. Under the construction given to the standard form by the court below, this express exception would be surplusage because if that construction were correct the reinsured would be entitled to payment of the reinsurance irrespective of whether it intended to pay the loss.

There are other provisions of the standard form which show that the reinsured cannot recover without making payment. These provisions are as follows:

(1) The reinsurer agrees to "reinsure * * * against loss" (R. 47, lines 3, 9; quoted in full *supra*, p. 4). An agreement to reinsure is an agreement of indemnity. See *Ill. Mut. Fire Ins. Co.* v. *Andes Ins. Co.*, 67 Ill. 362,

[1]The full text of the exception is as follows:

> "The Reinsured may, however, give the Reinsurer written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to have its share of such loss in the hands of the Reinsured by such date: provided, however, that the Reinsurer in any event shall have a period of forty-eight hours, after the receipt of such written notice from the Reinsured, to mail or otherwise despatch its payment; and provided further that in any such case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee of the bond." (R. 47, lines 74-79.)

363, 365; *Royal Ins. Co.* v. *Vanderbilt Ins. Co.*, 102 Tenn. 264, 267, 270; *Allison* v. *Fidelity Mutual Fire Ins. Co.*, 81 Neb. 494, 497-498; 28 Harv. L. Rev. 302. Therefore, the words *"reinsure* * * * against loss" mean *"indemnify* * * * against loss" and show that the reinsured cannot recover without making payment, because an agreement to indemnify against loss, made with reference to a possible claim by a third party against the indemnitee, merely indemnifies against payment of the claim. *Van Schaick* v. *Burney*, 145 Misc. 887, aff'd 237 App. Div. 812; *National City Bank of New York* v. *Berwin*, 240 App. Div. 550; *Barsuk* v. *Independence Indemnity Co.*, 236 App. Div. 162; *State* v. *Mills*, 23 N. M. 549. See *MacArthur Brothers Co.* v. *Kerr*, 213 N. Y. 360, 364-366; *In re Lathrop, Haskins & Co.*, 216 Fed. 102, 106-107 (C. C. A., 2nd); *Macklin* v. *Northern Bank of Kentucky*, 83 Ky. 314, 320-321.

(2) It is agreed that the reinsurer shall have a one-half share of the proceeds of any collateral available to the reinsured in connection with the bond (R. 47, lines 124-125, 16-20; R. 48).[1] This shows that the reinsurer's obligation is merely to pay one-half of the amount paid by the reinsured, for the obvious purpose is to give the parties proportionate reimbursement for their respective contributions to this amount, and the equal division of the collateral would effect this purpose only if the contributions were equal. Under the construction given to the standard form by the court

[1]The provision for division of collateral is as follows:

"The Reinsurer shall be entitled to share with the Reinsured, in the proportion defined in section 2 hereof, any collateral security or indemnity held by the Reinsured, or any right of action possessed by the Reinsured, in connection with the bond." (R. 47, lines 124-125.)

below the provision for division of collateral would be inapt because the insolvent reinsured would have more than its fair share of the collateral.

(3) It is agreed that the reinsured shall bear a certain portion of the risk under the bond without reinsurance (R. 47, line 22 *et seq.*).[1] The obvious purpose of this is to give assurance to the reinsurer that the reinsured, whose determination as to its own liability on the bond is made conclusive as between it and the reinsurer (R. 47, lines 58-63), will always have a substantial interest which will impel it diligently to resist claims of questionable merit. The protection thus guaranteed to the reinsurer would be destroyed by the construction given to the standard form by the court below. Such a construction would permit the liquidator of an insolvent reinsured to recover reinsurance without paying the loss under the bond. Thus the liquidator would have no substantial interest impelling diligent resistance to claims of questionable merit in any case where the reinsurance collected would exceed the dividend which the liquidator would pay to the insured under the bond as a general creditor, because the concession of liability for such claims would involve no diminution of the assets of the insolvent estate but on the contrary would be profitable to the estate.[2]

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[1]The pertinent provision is Section 3 of the standard form, called the "retention requirement", which provides that, with certain variations, "the amount of liability retained by the Reinsured at its own risk" shall be "in no event less than the amount ceded" to the reinsurer (R. 47, line 22 *et seq.*).

[2]To permit the realization of a profit out of the reinsurance would be inconsistent with the fundamental principle of insurance. See *British Dominions General Ins. Company, Ltd.* v. *Duder*, [1915] 2 K. B. 394, 401, 403; *Castellain* v. *Preston*, 11 Q. B. D. 380, 386; *Ill. Mut. Fire Ins. Co.* v. *Andes Ins. Co.*, 67 Ill. 362, 363-364; 29 Harv. L. Rev. 102; 28 Harv. L. Rev. 302.

II.

NOTHING IN THE *ALLEMANNIA* CASE REQUIRES THAT THE PLAIN MEANING OF THE LANGUAGE MAKING PROOF OF PAYMENT BY THE REINSURED A CONDITION PRECEDENT BE DISREGARDED.

In the *Allemannia* case it was pointed out that the only question in a case of this sort "is as to the construction of the language of the reinsurance compact" (209 U. S., pp. 331-332). The language to be construed in the present case is the language of provisions which reinsure "against loss" and provide for payment of reinsurance "upon proof of the payment" by the reinsured (*supra*, p. 4). The *Allemannia* agreement does not contain a provision which reinsures "against loss" or a provision which provides for payment of reinsurance "upon proof of the payment" by the reinsured (*supra*, pp. 6-7, *infra*, pp. 21-27). In no sense, therefore, can the *Allemannia* decision be deemed a precedent on the construction of these provisions. See *Estate of Whitney*, 171 Cal. 750, 760; *Sandberg* v. *Margold Realty Corp.*, 256 N. Y. 228, 231; *In re Oppenheimer's Estate*, 73 Mont. 560, 570, 571. In *Estate of Whitney, supra*, the court said (171 Cal., p. 760):

> "* * * As this court has had occasion to say repeatedly, decisions on the interpretation of written instruments have but limited value when applied to the construction of documents embodying different language."

The fact that the decision in the *Allemannia* case did not give effect to the plain meaning of the words which, liter-

ally, confined the liability of the reinsurer to a proportion of the sum "actually paid" by the reinsured does not require that here the plain meaning of the words which make proof of payment by the reinsured a condition precedent be disregarded. In the *Allemannia* case it was necessary to resolve a patent ambiguity. If the words "actually paid" had been taken literally they would have been inconsistent with the words requiring proof of loss by the reinsured "after said reinsured Company shall have adjusted, accepted proofs of, *or* paid such loss" (see pp. 7-8, 6-7, *supra*). In the present case there is no ambiguity and to disregard the plain meaning of the words "upon proof of the payment" and the words "reinsure * * * against loss" would create, not resolve, ambiguity. Under such circumstances the plain meaning of words cannot be disregarded. See *Bergholm* v. *Peoria Life Ins. Co.,* 284 U. S. 489, 491-492; *Harrison* v. *Fortlage,* 161 U. S. 57, 63; *Henrietta Mills* v. *Commissioner of Internal Revenue,* 52 F. (2d) 931, 934 (C. C. A., 4th).

In the *Allemannia* case it was assumed that reinsurance would lose its chief value unless the reinsured could discontinue business without keeping sufficient funds on hand to pay losses before collecting reinsurance (209 U. S., pp. 334-337). We respectfully submit that this assumption overlooks the fact that companies make reinsurance agreements in such form as to accomplish their particular purposes. Agreements like the standard form are designed to diversify the risks of a going business (R. 41-43, 47), whereas, when insurers desire to discontinue business, they make agreements involving such features as novation or assumption of risk whereby they pass on to the reinsurer

the duty of adjusting and paying claims. *Cf. Glen* v. *The Hope Mutual Life Ins. Co. of N. Y.*, 56 N. Y. 379; *The People* v. *National Surety Co.*, 68 Colo. 231; *Baird & Son* v. *Kaskaskia L. S. Ins. Co.*, 198 Iowa 905; *Empire Life Ins. Co.* v. *Landman*, 213 Ala. 248. Such agreements are in a distinct category of their own. See *People* v. *American Central Ins. Co.*, 179 Mich. 371, 375-376; *American Bonding Co.* v. *American Surety Co.*, 127 Va. 209, 219-221.

III.

NO RULE OF LAW REQUIRES THAT THE PLAIN MEANING OF THE LANGUAGE MAKING PROOF OF PAYMENT BY THE REINSURED A CONDITION PRECEDENT BE DISREGARDED.

Numerous decisions in this country, some before and some after the *Allemannia* case, have affirmed or assumed a "rule" to the effect that the reinsured can recover reinsurance without paying the loss.[1] But none of these cases in-

[1] *Hone* v. *The Mutual Safety Insurance Company*, 1 Sandf. 137, aff'd 2 N. Y. 235; *Norwood* v. *Resolute Fire Insurance Co.*, 47 How. Pr. (N. Y.) 43; *Ex Parte Norwood*, 3 Biss. 504, Fed. Cas. 10,364 (D. C., N. D. Ill.); *Cashau* v. *N. W. Nat. Ins. Co.*, 5 Biss. 476, Fed. Cas. No. 2,499 (C. C., E. D. Wis.); *Blackstone* v. *Alemannia Fire Ins. Co.*, 56 N. Y. 104; *Consolidated Real Estate & Fire Ins. Co.* v. *Cashow*, 41 Md. 59; *Fame Ins. Co.'s Appeal*, 83 Pa. St. 396; *Providence-Wash. F. Ins. Co.* v. *Atlanta-B. F. Ins. Co.*, 166 Fed. 548 (C. C., N. D. Ga.); *French Mut. General Soc.* v. *United States F. & G. Co.*, 203 Fed. 558 (D. C., D. Md.), rev'd on other grounds, 212 Fed. 620 (C. C. A., 4th), certiorari denied, 234 U. S. 758; *Globe N. F. Ins. Co.* v. *American B. & C. Co.*, 198 Iowa 1072; *Hicks* v. *Poe*, 269 U. S. 118, aff'g 293 Fed. 766 (C. C. A., 4th), which affirmed without opinion 276 Fed. 949 and 293 Fed. 764 (D. C., D. Md.); *Republic Metalware Co.* v. *Gen. Reinsurance Corp.*, 245 App. Div. 232, modified 245 App. Div. 907.

volved any language similar to that involved here except *Globe N. F. Ins. Co.* v. *American B. & C. Co.*, 198 Iowa 1072. That case involved a prior standard form of reinsurance agreement substantially like the one involved here. There the Iowa Court said, by way of *dictum*, that the receiver of the reinsured could recover reinsurance for the benefit of general creditors without paying the loss on the bond. It rested this *dictum* upon an assumed "well settled rule" and did not devote one word of its opinion to consideration of the language of the standard form before it corresponding with the provisions reinsuring "against loss" and requiring payment of reinsurance "upon proof of the payment" by the reinsured which are involved here.

The same tendency to seek a "rule" in prior decisions instead of seeking the parties' intention in the language of the agreement is manifest in several of the other cases cited in the footnote on the preceding page. Obviously, however, the only rule to be derived from the cases is that payment by the reinsured is not a condition precedent unless made such by the reinsurance agreement. In cases involving construction of reinsurance agreements as in any other cases of construction, the meaning of the words used must control. There is certainly no rule of law that the plain meaning of words making payment by the reinsured a condition precedent must be disregarded.

IV.

THE CONCLUSION OF THE CIRCUIT COURT OF APPEALS THAT THE PARTIES TO THE AGREEMENT SUED UPON DID NOT INTEND TO MAKE PROOF OF PAYMENT BY THE REINSURED A CONDITION PRECEDENT IS ERRONEOUS BECAUSE IT IS INCONSISTENT WITH THE PLAIN MEANING OF THE LANGUAGE OF THE AGREEMENT AND THE ASSUMPTIONS UPON WHICH IT IS BASED ARE NOT SUPPORTED BY ANY EVIDENCE.

The conclusion of the Circuit Court of Appeals that the parties did not intend to make proof of payment by the reinsured a condition precedent is erroneous because it is inconsistent with the plain meaning of the language of the agreement (see pp. 11-14, *supra*), and that plain meaning cannot be disregarded. See *Calderon* v. *Atlas Steamship Company,* 170 U. S. 272, 280; *Hawkeye Commercial Men's Ass'n* v. *Christy,* 294 Fed. 208, 213-214 (C. C. A., 8th); *National Pub. Co.* v. *International Paper Co.,* 269 Fed. 903, 904 (C. C. A., 2nd).

The court's conclusion as to the intention of the parties is erroneous for the additional reason that it is wholly hypothetical, resting upon a chain of assumptions which are not supported by any evidence. (See p. 9, *supra.*) The court could not properly find an intention of the parties on the basis of its series of unsupported inferences, first, that unidentified draughtsmen of the standard forms had knowledge of the *Allemannia* case, second, that these draughtsmen therefore had a certain intention, and, third, that these draughtsmen had such relation to Southern

and petitioner as to justify imputing their intention to these parties. Necessary facts cannot be found by thus piling inference upon inference. See *United States* v. *Ross*, 92 U. S. 281, 283-284; *Manning* v. *Insurance Co.*, 100 U. S. 693, 697-699; *United States F. & G. Co.* v. *Des Moines Nat. Bank*, 145 Fed. 273, 279 (C. C. A., 8th). Furthermore, with all deference to the Circuit Court of Appeals, we submit that it is not reasonable to assume that draughtsmen with the *Allemannia* case before them would have employed for the purpose of making payment by the reinsured a condition precedent any language other than the provisions of the standard form which reinsure "against loss" and require payment of reinsurance "upon proof of the payment" by the reinsured. This language is most appropriate for that purpose. (See pp. 11-14, *supra.*) It is far more cogent to conclude that if the draughtsmen had not intended a condition precedent they would never have used the language of a condition precedent.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED.

Dated, October 5, 1937.

Respectfully submitted,

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Appendix

Reinsurance Compact.

The Allemannia Fire Insurance Company of Pittsburg, Pa., With the Firemen's Insurance Company of Baltimore, Maryland.

By this compact of reinsurance The Allemannia Fire Insurance Company of Pittsburg, Pa., under the terms, conditions and stipulations hereinafter mentioned, hereby agrees to reinsure the Firemen's Insurance Company of Baltimore, Maryland, under its policies, renewals, entries, or certificates (herein termed contracts) in such amounts, for such periods of time, and at such rates of premium, as shall be entered in the book hereto attached, and duly reported, as hereinafter provided, by *The Allemannia Fire Insurance Company of Pittsburg, Pa., it Being Understood and Mutually Agreed* that each entry or certificate under this compact shall be made, issued and subject to and governed by the following terms, Conditions, and Stipulations:

Prohibitions, Lines and Limits.

1. Entries under this compact shall not be made to reinsure any portion of any contract covering risks prohibited in the list of *prohibited risks,* lines and limits furnished said Firemen's Insurance Company of Baltimore, Maryland, by this Company, and entries covering any risk or class of risks limited, shall not be binding for a sum in excess of the limits therein named, and entries shall not be binding for a sum exceeding the line or amount retained and carried by the said reinsured Company at its own risk, without other reinsurance, under its contracts covering property, in or on the same building or risk, in

or on which the contracts so reinsured may cover, and in or *on others next adjacent thereto or connected therewith.*

2. It being further understood, that when by cancellations of contracts, at request of the assured, or reinsured or by transfer to cover in another location, or by expiration of contracts, whereby the said reinsured Company may be left with a line of amount pending at its own risk of less than the amount reinsured, or without any contract so pending excepting that which may be reinsured *such entries shall not be invalidated thereby.*

AD-INTERIM ENTRIES.

3. *Ad-interim* or covering entries under this compact may be made to reinsure and cover such excess lines or risks, not prohibited and not to exceed the limits above referred to, as said reinsured Company may accept and insure or reinsure under its contracts.

4. Provided that on the day of such covering entry the said Firemen's Insurance Company as aforesaid of said reinsured Company shall mail to the said Allemannia Fire Insurance Company at Pittsburg, Pa., an advice or covering report of the number, amount and date of such entry, and state therein the name of reinsured, location, kind or class or risk covered, and the amount it may then have pending thereon.

5. The intention herein being, that this Company shall protect the said reinsured Company, in the manner herein provided, upon such excess lines, from the date they are covered under the contracts of said reinsured Company, until full reports of the same, may by it, be received, and such entries being fully reported to this Company as hereinafter provided, and in no event shall any *ad-interim* entry remain open or be binding *upon this Company for a longer period than fifteen days from the date thereof.*

Reinsurance Reports.

6. Each entry under this compact, and each cancellation, closing notice, endorsement or change that may refer to or change the ownership, location, or premium of the contract or risk hereunder reinsured, of which the said reinsured Company may have received notice at its office at Baltimore, Maryland, shall be promptly reported to this Company upon blanks provided for that purpose, and each of such reports shall contain a copy of the contract hereunder reinsured, and of the endorsements or changes herein referred to, and the amount, rate, premium, term and expiration of such contracts, or of the reports of same made to said reinsured Company by the parties issuing or making the same.

7. Full and regular reports as above, shall also be made to replace each advice or covering report and complete each *ad-interim* entry that may have been made under this Compact, within five days after said reinsured Company shall have received at its office at Baltimore, Maryland, a full report of the contract reinsured *ad-interim*, and in no event shall such full and regular reports be delayed beyond a period of fifteen days from the date of such *ad-interim* entry, otherwise, the same shall be deemed to have been terminated or rendered void; and all of the reports above referred to shall be lodged or filed with this Company and made a part of the entry to which they refer or pertain.

8. Each entry under this Compact shall be binding, commence, or take effect at 12 o'clock noon, of the day on which the reports herein referred to are mailed, addressed to the Allemannia Fire Insurance Company, at Pittsburg, Pa., and duly postmarked at the Post-office in the City of Baltimore, Maryland.

CANCELLATION OF ENTRIES.

9. This Company may decline any entry under this Compact, or cancel or terminate any entry by notifying the within named Firemen's Insurance Company, of said reinsured Company of its desire so to do, and refunding or tendering a pro-rata proportion of the reinsurance premium paid therefor, in which case the said reinsured Company shall be allowed ten days from the date of such notice within which to complete such cancellation, and the said reinsured Company may cancel and terminate any entry by allowing this Company the customary short rate proportion of the reinsurance premium thereon. It being understood that when any contract of said reinsured Company, hereunder reinsured, is cancelled at pro-rata rates, then this Company will refund at pro-rata proportion of the reinsurance premium received upon the entry reinsuring the same, also that a ratable proportion of any commission or other allowance made upon any reinsurance premium shll be deducted from the amount of unearned or returned premium, and the net balance only be returnable to said reinsured Company.

LOSSES AND LOSS EXPENSES.

10. Upon receiving notice of any loss or claim under any contract hereunder reinsured the said reinsured Company shall promptly advise the said Allemannia Fire Insurance Company, at Pittsburg, Pa. of the same, and of the date and probable amount of loss or damage, and after said reinsured Company shall have adjusted, accepted proofs of, or paid such loss or damage, it shall forward to the said Allemannia Fire Insurance Company, at Pittsburg, Pa., a proof of its loss and claim against this Company, upon blanks furnished for that purpose, by said Firemen's Insurance Company, together with a copy of the original

proofs and claim under its contract reinsured, and a copy of the original receipt taken upon the payment of such loss; and upon request, shall exhibit and permit copies to be made of all other papers connected therewith, which may be in its possession.

11. Each entry under this Compact, unless otherwise provided in this Compact, shall be subject to the same conditions, stipulations, risks, and valuation as may be assumed by the said reinsured Company under its original contracts hereunder reinsured, and losses, if any, shall be payable pro-rata with, in the same manner, and upon the same terms and conditions as paid by the said reinsured Company under its contracts hereunder reinsured, and in no event shall this Company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured Company under its original contracts hereunder reinsured, after deducting therefrom any and all liability of other reinsurers of said contracts or any part thereof.

12. This Company shall reimburse the said reinsured Company for a ratable proportion of all actual expenses, legal and otherwise, incurred by said reinsured Company in adjusting, resisting or investigating any claim for loss under its contracts hereunder reinsured, or allowed by it therefor upon receiving a statement or account of said expenses.

ACCOUNTS AND ALLOWANCES.

13. The said Officers of the said reinsured Company shall render to the said Allemannia Fire Insurance Company at Pittsburg, Pa. not later than the fifteenth day of each calendar month, a statement of all entries, or certificates of reinsurance made or issued under this Contract during the immediately preceding month, and shall accompany the

same with an account current exhibiting the amount of reinsurance premiums as shown by said statement, and a remittance by check to order of said Allemannia Fire Insurance Company, to cover the amount of same, after deducting therefrom, the amount of cancelled or returned reinsurance premiums reported during the same month, and from the balance thus obtained 30% and 10% contingent per centum to cover commissions and all expenses excepting loss expenses.

TERMINATION OF CONTRACT.

14. This compact of reinsurance may be discontinued and terminated by either Company herein named, upon its giving thirty days' notice in writing to the other, and in the event of such discontinuance and termination of this Compact, all risks previously reinsured and accepted hereunder, shall remain in full force and effect until the expiration or cancellation of the original contracts, reinsured, unless otherwise mutually agreed.

AD-INTERIM RENEWALS.

15. It is hereby understood and agreed that whenever contracts of the Firemen's Insurance Company, reinsured by any single policy, or by entries under this compact, or any policy of this Company, is continued beyond expiration or termination by said reinsured Company, either by a renewal, agreement, or a new policy, or entry upon the same risk for the same amount as the expired or terminated contract so reinsured, such single policies or entries under said Compact or policies shall be considered as continuing and binding, *ad-interim,* for a period of not exceeding twenty days from the date of their expiration, in the same proportion and manner as they originally applied to such reinsured contracts. Provided that said reinsured Com-

pany shall mail to the said Allemannia Fire Insurance Company, at Pittsburg, Pa., as provided in said Compact, a full report of the entry made to continue the reinsurance of such contracts as may be renewed or rewritten within five days after it shall receive notice of a renewal or continuation of such contracts, at its office at Pittsburg, Pa., and within twenty days after the expiration of said reinsurance policies or entries so continued, otherwise such *ad-interim* reassurances shall be void and of no effect.

IN WITNESS WHEREOF, this Company has caused these presents to be signed by its President and Secretary, in the City of Pittsburg, State of Pennsylvania, on this 8th day of June in the year eighteen hundred and ninety-five.

JOS. ABEL, *President.*

G. W. HAMMER, *Secretary.*